SANITIZED DEC. – 02-594 U(R) – BY – GEORGE V. PIPER – ISSUED – 12/10/03

SYNOPSIS

PURCHASERS' USE TAX -- UNLAWFUL PRACTICE OF LAW BY CERTIFIED PUBLIC ACCOUNTANT -- QUESTION OF LAW AS TO WHETHER "REASONABLE CAUSE" EXISTS FOR WAIVER OF ADDITIONS TO TAX -- Under Rule 17.3.2 of the Rules of Practice and Procedure before the West Virginia Office of Tax Appeals, 121 C.S.R. 1, § 17.3.2 (Apr. 20, 2003), *adhering, as required, to* the "Definition of the Practice of Law," promulgated by the West Virginia Supreme Court of Appeals (June 27, 1961), a certified public accountant who is not licensed to practice law in this State may raise, but may not argue, orally or in writing, in a non-small claim case before the West Virginia Office of Tax Appeals, the question of law as to whether "reasonable cause" exists on a given set of facts for the waiver of additions to tax, within the meaning of that term used in W. Va. Code § 11-10-18(a)(1)-(2) [1986].

PURCHASERS' USE TAX -- IGNORANCE OF BASIC USE TAX LAW -- NOT "REASONABLE CAUSE" FOR WAIVER OF ADDITIONS TO TAX -- The fact that a taxpayer is not actually aware of basic use tax law, enacted in the year 1951 as complementary to the consumers' sales and service tax, does not, by itself, constitute "reasonable cause" for waiver of additions to tax for failure to report and remit that tax for purchases which a reasonably prudent business person would realize are subject to the tax.

FINAL DECISION

A Tax Examiner with the Field Auditing Division (the "Division") of the West Virginia State Tax Commissioner's Office ("the Commissioner") conducted an audit of the books and records of the Petitioner.

The Director of the Auditing Division of the Commissioner's Office issued a purchasers' use tax assessment against the Petitioner. This assessment was for the period of July 1, 1999 through April 30, 2002, for tax and interest, through July 31, 2002, and additions to tax.

Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked September 12, 2002, the Petitioner timely filed a petition for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002].

After filing its petition for reassessment Petitioner paid the full amount of the tax and assessed interest, in protest, to stop the running of interest on the assessment. Accordingly, the Petition for reassessment has been converted to a petition for refund, under the provisions of W. Va. Code § 11-10-8(c) [2000].

FINDINGS OF FACT

At the hearing Petitioner's representative withdrew Petitioner's refund claim and stated that the Petitioner only sought waiver of the additions to tax.

DISCUSSION

The first issue is whether a certified public accountant representing a taxpayer in a non-small claim case before this independent, quasi-judicial, tribunal may argue whether "reasonable cause" exists for waiver of additions to tax.

The certified public accountant representing the Petitioner-taxpayer in this matter asserts, essentially, that he, as a certified public accountant who is not licensed to practice law in this State but who, as a certified public accountant, is more knowledgeable about [substantive] tax law than most lawyers licensed to practice law in this State, may argue to this independent, executive branch quasi-judicial, tax tribunal the question as to whether "reasonable cause" exists for waiver of the additions to tax.

To protect the public (not lawyers), Rule 17.3.2 of the Rules of Practice and Procedure before the West Virginia Office of Tax Appeals, 121 C.S.R. 1, § 17.3.2 (April 20, 2003), quotes the very broadly worded "Definition of the Practice of Law"

promulgated by the West Virginia Supreme Court of Appeals (as amended on June 27, 1961) as part of that august body's overriding jurisdiction – even *vis-à-vis* the Legislature -- to regulate the practice of law in this State (this definition is published in Michie's West Virginia Code Annotated, State Court Rules 2003 volume, at 695):

> '[O]ne is deemed to be practicing law whenever . . . (3) one undertakes, with or without compensation and whether or not in connection with another activity, to represent the interest of another before any judicial tribunal or officer, **or to represent the interest of another before any executive or administrative tribunal**, agency or officer otherwise than in the presentation of facts, figures or factual conclusions as distinguished from **legal conclusions** in respect to such facts and figures.'

(bold print emphasis added) *See also* Melissa K. Stull, 1 Am. Jur. 2d *Accountants* § 10 (2003), *citing, inter alios,* syllabus point 11, *Gardner v. Conway*, 234 Minn. 468, 48 N.W.2d 788 (1951), and *Agran v. Shapiro*, 127 Cal. App. 2d Supp. 807, 818-19, 273 P.2d 619, 626-27 (1954) ("When faced with interpretation or application of tax statutes, administrative regulations and rulings, court decisions, or general law, it is an accountant's duty [before a state tax tribunal] to leave such questions to a lawyer."); *Baron v. City of Los Angeles*, 2 Cal. 3d 535, 543, 469 P.2d 353, 358, 86 Cal. Rptr. 673, 678 (1970) ("The cases uniformly hold that the character of the act, and not the place where it is performed, is the decisive element, and if the application of legal knowledge and technique is required, the activity constitutes the practice of law, even if conducted before [a state] administrative board or commission."). *See generally* R.F. Martin, Annotation, 9 A.L.R. 2d 797, "Services in Connection with Tax Matters as Practice of Law" (1950 & Supp. 2003). *Cf.* Matthew A. Melone, C.P.A. (& J.D. candidate at the time), "Income Tax Practice and Certified Public Accountants: The Case for a Status Based Exemption from State Unauthorized Practice of Law Rules," 11 Akron Tax J. 47 (1995) (arguing that

certified public accountants, due to their peculiarly relevant education and professional character requirements, should be authorized, generally, to practice tax law, except, as noted at page 49, with respect to "Tax Court practice or practice before any other judicial forum [because of, *inter alia*,] . . . the issue of whether certified public accountants can effectively circumnavigate the applicable rules of procedure.").

The Supreme Court of the United States has addressed the underlying issue raised here. "Whether the elements that constitute 'reasonable cause' [for waiver of additions to tax] are *present* in a given situation is a question of fact, but what elements *must* be present to constitute 'reasonable cause' is a question of **law**." *United States v. Boyle*, 469 U.S. 241, 249 n.8 (in relevant part), 105 S. Ct. 687, 692 n. 8, 83 L. Ed. 2d 622, 630 n. 8 (1985) (bold print emphasis added).

Therefore, at least in a non- small claim case like this one, a certified public accountant who is not licensed to practice law in this State may raise, but may **not** argue, orally or in writing, before this independent executive branch, quasi-judicial, tax tribunal, the question of **law** as to whether, on a given set of facts, "reasonable cause" exists for waiver of additions to tax.

This tribunal will, however, address the issue, raised by the Petitioner-taxpayer of whether the additions to tax should be waived and will decide that issue of law based upon its own legal research.

Therefore, the second issue is whether the Petitioner has established that the failure to properly report and pay the purchasers' use tax resulted from "reasonable cause" within the meaning of W. Va. Code § 11-10-18(a)(1)-(2).

Petitioner's bookkeeper asserts in her affidavit that she was unaware that use tax applied to items delivered from out-of-state for use in the business or that the tax applied to maintenance and other nonprofessional services which were used by the Petitioner in its automobile dealership business. (emphasis by this tribunal). A reasonably prudent business person understands the elementary nature of the use tax, enacted in the year 1951, and actual ignorance of the same, by itself, does not constitute "reasonable cause," required by W. Va. Code § 11-10-18(a)(1)-(2), in addition to the lack of willful neglect, in order to justify the discretionary waiver of additions to tax for the failure to report or to remit or both.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. Under 17.3.2 of the Rules of Practice and Procedure before the West Virginia Office of Tax Appeals, 121 C.S.R. 1, § 17.3.2 (Apr. 20, 2003), adhering, as required, to the "Definition of the Practice of Law," promulgated by the West Virginia Supreme Court of Appeals (June 27, 1961), a certified public accountant who is not licensed to practice law in this State may raise, but may not argue, orally or in writing, in a non-small claim case before the West Virginia Office of Tax Appeals, the question of law as to whether "reasonable cause" exists on a given set of facts for the waiver of additions to tax, within the meaning of that term used in W. Va. Code § 11-10-18(a)(1)-(2) [1986].

2. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a petitioner-taxpayer to show that "reasonable cause" exists for waiver of additions to tax, in addition to showing the lack of willful neglect.

3. The Petitioner-taxpayer in this matter has failed to establish "reasonable cause" asserting merely the ignorance of a law that has been on the books since the year 1951 and which clearly applies to the purchases in question for use in the business.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the purchasers' use tax assessment issued against the Petitioner for the period of July 1, 1999 through April 30, 2000, for tax, interest, and additions to tax, should be and is hereby **AFFIRMED.**

Because the Petitioner has previously remitted said tax and interest, only the additions to tax remains due and owing.